Supreme Court, U.S.
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No. 02-1028

In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY, PTY LTD., dba Kirby Engineering, and ALLIANZ AUSTRALIA LIMITED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* AIR TRANSPORT ASSOCIATION OF AMERICA, INC., IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

The Air Transport Association of America, Inc., ("ATA") is an association of twenty-two U.S. and four foreign airlines.[1] The ATA's U.S. members operate within the United States and between the United States and foreign countries. Its foreign members also operate between the United States and foreign countries and are subject to suit in the United States. A principal purpose of the ATA is to support its member airlines by promoting the cost-effective delivery of air transportation services and advocating common industry positions on important policy and legal issues. Since its inception in 1936, through both regulated and deregulated eras, the ATA has been involved in the development of the law governing carriage of goods by air. That law now centers around the Airline Deregulation Act of 1978 ("ADA"), which, as the Court recognized in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992), and *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995), contemplates that market forces, rather than

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[1] This brief was authored by counsel for the ATA and not, in whole or in part, by counsel for either party. No person or entity, other than the ATA and its members, made a monetary contribution to the preparation or submission of this brief. The ATA's member airlines are: ABX Air, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, ASTAR Air Cargo, ATA Airlines, Inc., Atlas Air, Continental Airlines, Delta Air Lines, Evergreen International Airlines, FedEx Corporation, Hawaiian Airlines, JetBlue Airways, Menlo Worldwide, Midwest Airlines, Northwest Airlines, Polar Air Cargo, Southwest Airlines, United Airlines, UPS Airlines, and US Airways. Associate members are: Aeromexico, Air Canada, Air Jamaica, and Mexicana.

governmental regulation, will dictate the terms of contracts for carriage by air.

The opinion below is of significant interest to the ATA's member airlines because it threatens to upset well-established principles of law relied upon to provide certain air cargo transportation services to freight forwarders pursuant to specific contracts.[2] Like Norfolk Southern in this case, air carriers sometimes operate as connecting or "intermediate" carriers in freight-forwarding arrangements. When air carriers operate in such arrangements, they typically do so pursuant to the terms and conditions included in their own "airbills."[3] These airbills,[4] like bills of lading, are issued to the parties with whom airlines contract. Consistent with the ADA's market-based regime, air carriers expect to be governed by the terms and conditions of these airbills, even when they act as intermediate carriers.

In providing intermediate air transportation services, air carrier conduct is based in part on settled expectations recognized by the courts. Thus, when accepting goods from a freight forwarder,[5] common carriers are "not concerned with questions of ownership, but must treat the forwarder as

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[2] All parties have consented to the filing of *amicus* briefs in favor of both Petitioner and Respondents.

[3] Terms and conditions in airbills for international carriage also implement the treaty-based liability regime governing international air transportation, commonly known as the Warsaw Convention, whose original text is reprinted at 49 U.S.C. § 40105 (note). The Warsaw Convention has been amended, and the United States has ratified the amendments in part.

[4] Airbills are referred to as "air waybills" by some air carriers.

[5] A "freight forwarder" is "[a] person or company whose business is to receive and ship goods for others." BLACK'S LAW DICTIONARY at 64 (7th ed. 1999).

shipper." *St. Paul & Pac. R. Co. v. Acme Fast Freight, Inc.*, 336 U.S. 465, 487, 69 S. Ct. 692, 702, 93 L. Ed. 817 (1949) (citing *Interstate Commerce Comm'n v. Delaware, Lackawanna, & W. R. Co.*, 220 U.S. 235, 31 S. Ct. 392, 55 L. Ed. 448 (1911)). Common carriers cannot "sit in judgment on the title of the prospective shipper," *Delaware, Lackawanna*, 220 U.S. at 252, 31 S. Ct. at 398, or "scrutinize ownership of the cargo" before accepting it for shipment, *Nippon Fire & Marine Ins. Co., Ltd. v. Skyway Freight Sys., Inc.*, 235 F.3d 53, 61 (2d Cir. 2000).[6] Therefore, common carriers are entitled to assume that a shipper who tenders goods is authorized to form a contract of carriage and to agree to its attendant terms and conditions. *Id.* at 62 n.4 (citing *Nippon Fire & Marine Ins. Co., Ltd. v. Skyway Freight Sys., Inc.*, 45 F. Supp. 2d 288, 293-94 (S.D.N.Y. 1999); *Hampton v. Federal Express Corp.*, 917 F.2d 1119, 1125-26 (8th Cir. 1990)).

The ATA is concerned that the decision below could be read to alter these settled expectations. Specifically, the decision below might be read to suggest that a shipper may avoid the liability limitations in a carriage contract between a forwarder and a common carrier by asserting that it was not a party to the contract and therefore is not bound by it. Such a reading is unsustainable under basic carriage law and must not be permitted to stand.

To avoid any uncertainty, the Court should correct the decision below in either of two ways. First, it could reverse,

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[6] Such scrutiny is impractical because freight forwarders ship a substantial volume of cargo and intermediate air carriers may never deal directly with the owner of that cargo. Air carriers could not trace the title of that cargo, or any agreements as to liability for it, without severely impeding the flow of commerce.

as a matter of law, the holding of the court below that the freight forwarder ("ICC") acted only as a principal in contracting with the ocean carrier ("Hamburg Sud"). In that instance, the shipper's breach-of-contract claim would not be able to proceed unburdened by the terms and conditions contained in Hamburg Sud's bill of lading and accepted by ICC as agent for Kirby, the original shipper. Alternatively, the Court could uphold the determination that ICC acted only as a principal but make clear the inevitable consequence that Kirby could not maintain a breach-of-contract action against Norfolk Southern, with whom it had no contract.[7] Either of these holdings would safeguard the eminently reasonable expectation of an air carrier that the terms and conditions of its airbill will be enforced when it acts as an intermediate carrier, even if it lacks privity with the original shipper or consignor.

SUMMARY OF THE ARGUMENT

Regardless of whether ICC is determined to be an agent or a principal in its transaction with Kirby, Norfolk Southern's liability should be governed solely by the terms and conditions in its contract of carriage. The decision below implies that Kirby can both sue Norfolk Southern directly and be free from the Norfolk Southern's liability limitations. This implication cannot stand.

If Kirby did not contract with Norfolk Southern, either directly or through agents, then Kirby cannot sue Norfolk

[7] In the absence of a breach-of-contract action, Kirby has no action against Norfolk Southern at all, because Norfolk Southern did not assume any duties beyond those defined in the contract of carriage, including any duties to an unforeseeable plaintiff like Kirby. *See Nippon*, 235 F.3d at 62 n.4.

Southern for breach of contract. It is hornbook law that one may not maintain a breach-of-contract action without privity of contract with the defendant or, at the very least, the status of third-party beneficiary. The Court should not permit a contrary implication to stand.

Furthermore, the Court should make clear that, in the absence of a breach-of-contract action, Kirby has no claim against Norfolk Southern at all. A carrier's duties to a shipper are defined in its contract of carriage, and it assumes no duties beyond those defined, including any duties to unforeseeable plaintiffs. Therefore, Kirby can either sue Norfolk Southern for breach of contract, subject to the terms and conditions of the contract of carriage, or Kirby cannot sue Norfolk Southern at all.

ARGUMENT

1. The Court has before it a variety of arguments regarding on whose behalf ICC acted in this case when it contracted with Hamburg Sud. The Court must decide whether ICC was acting either as an agent of Kirby or as its own principal when placing Kirby's goods with another carrier. The ATA will not add to the amply briefed arguments seeking to answer this question. Instead, the ATA urges the Court to issue an opinion that makes the natural implications of its determination clear—regardless of how it decides the actual question of agency. Thus, if the Court determines that ICC was Kirby's agent, then it should also hold Kirby bound to Hamburg Sud's bill of lading. On the other hand, if the Court concludes that ICC acted as its own principal, then it should also hold that no breach-of-contract or tort action by Kirby will lie against Norfolk Southern.

2. If the Court determines that ICC contracted with Hamburg Sud on behalf of Kirby—*i.e.*, as Kirby's agent—then the Court should also conclude that Kirby is bound by the contract that ICC ultimately struck with Hamburg Sud. When an agency relationship exists, and an agent enters into a contract on behalf and with the authority of its principal, the principal is bound by the contract. *See* RESTATEMENT (SECOND) OF AGENCY § 144 ("A disclosed or partially disclosed principal is subject to liability upon contracts made by an agent acting within his authority if made in proper form and with the understanding that the principal is a party."); *id.* § 147 ("Unless otherwise agreed, a disclosed or partially disclosed principal is a party to a contract, if not negotiable or sealed, made by his agent within his authority."); *id.* § 186 ("An undisclosed principal is bound by contracts and conveyances made on his account by an agent acting within his authority, except that the principal is not bound by a contract which is under seal or which is negotiable, or upon a contract which excludes him."); *id.* § 190 ("An undisclosed principal may be liable upon a simple contract in writing, although it purports to be the contract of the agent."). Thus, when a principal brings a breach-of-contract action against a party that contracted with its agent, the principal is held to the terms and conditions of the contract.

Pursuant to these agency principles, then, ICC—if found to be an agent of Kirby—would have been able to bind Kirby to the terms and conditions of the contract with Hamburg Sud, which included, among other things, Hamburg Sud's Himalaya Clause and Clause Paramount. Such a conclusion would, of course, leave open the questions of (a) whether those clauses absolved Norfolk Southern of liability in this case and (b) the nature of Hamburg Sud's relationships with ICC, Norfolk Southern, and Kirby. The court below did not

consider, and, because of its holding, did not have occasion to consider, either of these questions. But, however these questions are resolved, it should be clear that, unless Kirby's agent (or a subagent of its agent) bound Kirby to a contract with Norfolk Southern, Kirby cannot bring a breach-of-contract action against Norfolk Southern.

3. If no agent bound Kirby to a contract with Norfolk Southern, then Kirby cannot file a breach-of-contract action directly against Norfolk Southern. The most axiomatic of contract principles requires that some kind of contract—express or implied, oral or written—must exist between two parties before one can sue the other for breach of contract. *See, e.g.*, *Johnson v. All Am. Life Ins. Co.*, 838 F. Supp. 1556, 1559 (M.D. Fla. 1993); *McCulley Fine Arts Gallery, Inc. v. X Partners*, 860 S.W.2d 473, 476-77 (Tex. Ct. App. 1993). When there is no such contract between the parties themselves—when they lack "privity of contract"—they cannot sue each other for breach of contract. *See* BLACK'S LAW DICTIONARY 1217 (7th ed. 1999) (defining "privity of contract" as "[t]he relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so.").

In this case, Norfolk Southern did not contract with Kirby itself. If Norfolk Southern also did not contract with an agent of Kirby, then no breach-of-contract action can possibly lie between Kirby and Norfolk Southern. In the absence of any agency relationships, Kirby can only sue ICC for breach of contract because Kirby only had a contract with ICC. If ICC is found liable, it might then recover against Hamburg Sud based on their contract, and so on down the line. While this series of suits may ultimately lead to a breach-of-contract action against Norfolk Southern, Kirby will never be the plaintiff in such an action. *See, e.g.*, *Pierce Assocs., Inc. v.*

Nemours Foundation, 865 F.2d 530, 535-36 (3d Cir. 1989) (describing the effect of a lack of privity in the construction context, which is to restrict owners to suing general contractors and bar them from suing subcontractors).[8] Accordingly, if the Court determines that Norfolk Southern contracted with neither Kirby nor its agent or subagent, as the court below apparently determined, then it should reverse the decision below to the extent that decision implies the existence

[8] Kirby might be able to sue Norfolk Southern directly for breach of contract if it could demonstrate that Kirby was the intended third-party beneficiary of whatever contract Norfolk Southern formed for carriage of the shipment. *See* RESTATEMENT (SECOND) OF CONTRACTS § 304. But the decision below reflects no consideration of this argument, and the Court should not consider it in the first instance. Even when such arguments are made, they require shippers and consignors to show that they are third-party beneficiaries intended by the contracting parties, and not merely incidental beneficiaries of the contract. *See id.* Such a showing should not be possible when an intermediate carrier is not even aware of the initial shipper or consignor's existence or identity. *See, e.g., Neal v. Republic Airlines, Inc.*, 605 F. Supp. 1145, 1150 (N.D. Ill. 1985) ("With Republic [Airlines] having no specific awareness of plaintiffs' existence or of their interest in the contract, it is wholly implausible to conclude that they were intended beneficiaries. At most they were incidental beneficiaries of Republic's performance and as such have no right to sue."). More fundamentally, pursuit of third-party-beneficiary status would not advance the case of a shipper or consignor seeking relief beyond that permitted by the applicable contract for carriage. As a third-party beneficiary of the carriage contract, the shipper or consignor would also be subject to the contract's limits on liability. *See, e.g., Gen'l Ins. Co. of Am. v. Interstate Serv. Co., Inc.*, 701 A.2d 1213, 1218 (Md. Ct. App. 1997) ("Under Virginia law, an intended third-party beneficiary to a contract is entitled to enforce the terms of the contract and is subject to all defenses arising out of the contract.").

of a valid breach-of-contract claim by Kirby against Norfolk Southern.

4. The court should also make clear that, in the absence of a breach-of-contract action against Norfolk-Southern, Kirby has no action at all. Under long-standing principles of carriage law, a carrier's liability limitations "limit recovery not only for breach of contract, but also based on other legal theories, including negligence, bailment, or conversion." *Nippon*, 235 F.3d at 60. As a result, a shipper "may not, by recasting the form of action, escape the effect of a valid stipulation restricting liability to the declared valuation." *Neal v. Republic Airlines, Inc.*, 605 F. Supp. 1145, 1148 (N.D. Ill. 1985) (citing *Young v. Delta Air Lines, Inc.*, 432 N.Y.S.2d 390 (N.Y. App. Div. 1980)).

When seeking to recover against an intermediate carrier, then, a shipper may not proceed in tort; instead, the shipper "must proceed, if at all, on a breach of contract theory." *Neal*, 605 F. Supp. at 1148. A shipper may pursue a breach-of-contract claim as a party to the contract—either through agency or privity principles—or as a third-party beneficiary of the contract. If the shipper cannot claim breach of contract as either a party or as a third-party beneficiary, however, then the shipper simply has no claim against the intermediate carrier at all. *Neal*, 605 F. Supp. at 1150 (dismissing plaintiff's breach-of-contract claim—the only claim allowed to go forward—for lack of privity).

This principle of carriage law—that carriers may be sued only for breaches of their carriage contracts—is consistent with the general rule that "'a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party,

when injury resulting from the breach is damage to the subject matter of the contract.'" *Holden Farms, Inc. v. Hog Slat, Inc.*, 347 F.3d 1055, 1061 (8th Cir. 2003) (quoting *Spillman v. American Homes*, 422 S.E.2d 740, 741-42 (N.C. Ct. App. 1992)). Both the carriage principle and the general rule recognize that, when a carrier accepts a shipment, any duty to deliver the shipment, undamaged or otherwise, arises only out of its contract for carriage, and liability in excess of that contract's limits, or to parties not contemplated by that contract, is unforeseeable and baseless. *See, e.g., Nippon*, 235 F.3d at 62 n.4. If Kirby cannot proceed against Norfolk Southern for breach-of-contract, then it cannot proceed against Norfolk Southern at all, and the Court should reverse the decision below to the extent that it holds otherwise.[9]

5. Allowing Kirby to proceed under a breach-of-contract theory, or not at all, best enforces the reasonable expectations of the parties to a carriage transaction. Based on longstanding principles of carriage law, Norfolk Southern expected its liability for the shipment at issue to be limited by the terms to which it agreed, and Norfolk Southern set its rates accordingly. But, as the United States has pointed out, the liability that Norfolk Southern now confronts is inconsistent

[9] In addition to the protections afforded by these principles of carriage law, air carriers who serve as intermediate carriers under their own airbills are further protected from extra-contractual tort actions by the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713(b)(1). *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995) (holding that the ADA preempts all state-law actions relating the prices, routes or services of airlines except breach-of-contract actions seeking to enforce self-imposed obligations of airlines). For international air carriage, recovery will be limited by the Warsaw Convention. *See, e.g., Banihashemrad v. Lufthansa Cargo AG*, 28 F. Supp. 2d 1014 (W.D. Tex. 1998).

with both its expectations and its rates. U.S. Br. 18-19. The Court should reverse the decision below for this reason alone.

But the decision of the court below actually upsets even Kirby's expectations. It is a longstanding principle of common carriage law that passengers, shippers, and consignors should expect to be bound to reasonable terms and conditions of which they have notice in a passenger ticket, cargo airbill, bill of lading, or other shipping document. *See, e.g., Deiro v. Am. Airlines, Inc.*, 816 F.2d 1360, 1363-66 (9th Cir. 1987) (holding a passenger to baggage liability limitations noticed on the passenger's ticket). Passengers, shippers, and consignors who have agreed to liability limitations have no reason to expect a recovery beyond those limitations; insurers who are subrogated to their rights have even less expectation of such a recovery.

Because, in its contract with ICC, Kirby did not declare the full value of its shipment or pay the corresponding rate, Kirby should not have expected that—in the event of loss, damage, or delay—it would be able to recover the full value of its shipment from anyone. That Kirby anticipated such a limited recovery is evidenced by the fact that it arranged for insurance. But the decision below has given Kirby's insurer a windfall: a release from liability limits for which Kirby neither contracted nor paid. Through this windfall, the insurer is being permitted to evade the very risk for which it contracted to indemnify Kirby.

A rule that frees Kirby from the liability limits for which it contracted does not place the burden of assessing the risks associated with a shipment on the party best equipped to deal with them. The ATA joins with Norfolk Southern, the United States, and other industry *amici* in urging the Court's reversal of such a rule.

CONCLUSION

The settled expectations of the ATA and its members could be unfairly upset by an indirect implication of the decision below: that a shipper is able to sue an intermediate carrier directly but free from the terms and conditions of the contract under which the carrier agreed to ship. The ATA asks the Court to ensure that this mistaken implication does not obtain a foothold by reversing the decision below.

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